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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 217

MOSES JOSEPH BRACEY, RAYMOND JOHNSON, KELLY WHITELY, ET AL.,
Petitioners,

VS.

EMANUEL LURAY,
Trading As
LURAY IRON AND METAL COMPANY,
Respondent.

ANSWER AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The Daily Record Co., Baltimore 3, Md.

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ANSWER TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, Emanuel Luray, trading as Luray Iron and Metal Company, opposes the issuing of a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered April 2, 1947, affirming the order of the District Court for the District of Maryland dated October 7, 1946, as prayed by the Petitioners.

SUMMARY STATEMENT.

This litigation originated in an action filed by the Petitioners against the Respondent to recover unpaid minimum wages, overtime compensation and liquidated damages and attorney's fee, under Section 16 (b) of the Act (29 U. S. C. A. Sec. 16 (b)). After the hearing the lower Court gave judgment for the Respondent (49 F. Supp. 821). Upon appeal, the United States Circuit Court of Appeals for the Fourth Circuit reversed the lower Court, and the case was remanded for further proceedings to determine the amounts due the various Petitioners (138 F. (2) 8).

The Federal Court then referred the matter to a Special Master, whose findings were approved and judgments in favor of the Petitioners were entered for the sum of $2894.65 for minimum wages and overtime, $2894.65 as liquidated damages, $1000.00 Masters fee and $1500.00 counsel fee.

The Respondent being at that time insolvent and unable to pay the aforesaid judgment, entered into an agreement with the Petitioners (pp. 12-15) stipulating therein, that upon payment of the sum of $2500.00, representing the Master's and counsel fee and upon further payment of the sum of $2894.65 in monthly instalments of $200.00 each, the Petitioners would execute proper releases and orders of satisfaction for the entire judgment. After the balance of $2894.65 was paid in full, Petitioners instead of executing proper releases and orders of satisfaction, as agreed upon, caused an attachment to be issued. The said attachment was countered with the "motion to quash" which said motion was granted by the United States District Court for the District of Maryland on October 7, 1946. Appeal was entered by the Petitioners to the United States Circuit Court of Appeals for the Fourth Circuit where the judgment of the United States District Court for the District of Maryland was affirmed on April 2, 1947.

QUESTIONS PRESENTED.

1. Is the agreement dated August 31, 1944, a good and valid contract of compromise and settlement?

2. Was the agreement dated on August 31, 1944, breached by the Respondent?

REASONS FOR OPPOSING THE GRANTING OF THE WRIT.

The Respondent in opposing the granting of the writ maintains that the case herein contains no special and important reasons to be entitled to it. The decision rendered by the United States Circuit Court of Appeals for the Fourth Circuit is not in conflict with the decision of any other Circuit Court of Appeals on the same matter, nor has it decided an important question of local law in conflict with applicable local decisions, nor has it decided a question of federal law which has not been settled by this honorable Court, nor has it decided a federal question in conflict with applicable decisions of the honorable Court, nor has it departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this honorable Court's power of supervision.

EMANUEL LURAY,
Trading as Luray Iron
and Metal Company,
Respondent.

By LEWIS W. LAKE,
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Attorneys for Respondent.

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BRIEF OPPOSING THE GRANTING OF THE WRIT OF CERTIORARI.

ARGUMENT.

QUESTION 1.

IS THE AGREEMENT DATED AUGUST 31st, 1944, A GOOD AND VALID CONTRACT OF COMPROMISE AND SETTLEMENT?

When the judgment for minimum wage, overtime and liquidated damages, was finally rendered in the original case, on July 17, 1944, the Respondent was insolvent and unable to pay the judgments. The Respondent submitted to the Petitioners an itemized statement of all his assets and liabilities, showing his liabilities to be 100% greater

than his assets (pp. 9-11). It was subsequent to that date and on August 31, 1944, that the agreement of settlement was entered into (pp. 12-15), wherein it was agreed by the Respondent, to pay each Petitioner his respective claim for unpaid minimum wages and/or unpaid overtime in full and a nominal consideration in settlement of judgments for liquidated damages, in addition to the Master's and counsel fees. The question before this Honorable Court is, whether "liquidated damages", under Section 16 (b) of the Act, can be settled for less than the full amount alloted by the Court, after a full and complete hearing in open Court and after judgment is entered?

The Respondent maintains, that the agreement of settlement is valid because:

A. The agreement involved exceptional circumstances of the kind *held* to *justify* a waiver agreement.

B. The agreement was a legal compromise of a final judgment and not a compromise or "waiver of a subsequent right of action for liquidated damages."

A.

The agreement involved exceptional circumstances of the kind held to justify a waiver agreement.

Even if it is admitted, that the herein agreement was not a settlement of a final judgment, but was a waiver of a subsequent right of action for liquidated damages, nevertheless, under the circumstances, in the present case, the waiver was justified.

The facts in this case show that the Respondent was insolvent at the time the judgment was rendered, and should the Petitioners have insisted on full payment of liquidated damages at that time, the Respondent would have been

compelled to apply for adjudication in Bankruptcy. This would have been disastrous to all concerned, especially to the Petitioners. The Petitioners have actually benefited by the settlement, since they received more than 50% of their total judgment. Even the former solicitors of the Petitioners, by joining in the agreement and by the nature of their testimony, admitted that this matter involved exceptional circumstances to justify the settlement.

This Honorable Court held in the case of Brooklyn Bank v. Oneil, 324 U. S. 697, 65 S. Ct. 895, (Apr. 9, 1945), in referring to "exceptional circumstances", said on page 709, as follows:

> ". . . Nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in Fort Smith & Western R. Co. v. Mills, 253 U. S. 206."

The facts in the case of Fort Smith & Western R. Co. v. Mills, supra, show that the railroad entered into an agreement with its employees, fixing their wages for less than prescribed by the Adamson Act of 1916, and this Honorable Court said on page 208, as follows:

> ". . . An insolvent road has succeeded in making satisfactory terms with its men, enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill and must assume that the men were not merely negatively refraining from demands under the Act but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed, import an exception in a case like this."

Because of the aforesaid, the Respondent respectfully maintains that the agreement of settlement dated August 31, 1944, was a good and valid compromise and settlement.

B.

The agreement was a legal compromise of a final judgment and not a compromise or "waiver of a subsequent right of action for liquidated damages."

This Honorable Court said in the case of Brooklyn Bank v. Oneil, supra, that in the *absence* of a bona fide dispute between the parties as to liability, employees' written waiver of his right to liquidated damages under Sec. 16 (b) does not bar a subsequent action to recover liquidated damages. While in the present case, there was a bona fide dispute between the parties, as proven by the decision of United States District Court for the District of Maryland and the United States Circuit Court of Appeals for the Fourth Circuit. The judgment had been obtained and was a matter of record, where the agreement of settlement was entered into. In fact this Honorable Court amended in the above case that (page 713):

> ". . . Our decision of the issues raised in No. 445 and No. 554 has not necessitated a determination of what limitation, if any, Sec. 16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise settlement. Neither of the above mentioned cases presented such issues for our consideration. . . ."

QUESTION 2.

WAS THE AGREEMENT DATED AUGUST 31, 1944, BREACHED BY THE RESPONDENT?

The Petitioners ultimately received all that they were entitled to under the agreement, although the monthly payments were completed in March, 1946, instead of November, 1945. It is true that the regularity in payments was disturbed about June, 1945, nevertheless, at that time four-fifths of the indebtedness had already been paid.

It is also significant that nothing was done by the Petitioners to repudiate the agreement until August 9, 1946, about five months after all the payments were completed. In addition, it was plainly proven that an extension of time to make the monthly payments was given by the Petitioners. That the time was not of the essence, was clearly manifested by the action of the Petitioners, in continuing to accept payments and failing to apprize the Respondent of their intention to declare the agreement breached.

The Court of Appeals of Maryland, in the case of Shriver Co. v. Interocean Co., 157 Md. 341, said on page 352, as follows:

> "... When payments have been customarily received later than a day specified and the dealer decides to disallow any further grace, in order to put himself in position to rescind for failure to pay on time, he must give the debtor notice that the terms of the contract must be observed, or that no further delays will be tolerated. ..."

Also in the case of Kemp v. Weber, 180 Md. 362, the Court said on pages 365-366:

> "... When a party to a contract is faced by some failure in carrying out its terms on the part of the other party, he has, in general, either a right to retain

the contract, and collect damages for its breach, or a right to rescind the contract and recover his own expenditures. Obviously he cannot do both. The contract cannot be in effect, and at the same time rescinded. If in effect, he can get damages; if rescinded, he must return his benefits, and receive his expenditures. He cannot of course, retain the benefits and get back his expenditures. He would then be receiving a free gift of whatever he got under the contract. He, therefore, has a choice. . . ."

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari prayed for should not be granted because there are no special and important reasons given therefore.

Respectfully submitted,

LEWIS W. LAKE,
WILLIAM SAXON,
Attorneys for Respondent.